No. 20-14813

In the

United States Court of Appeals

for the Eleventh Circuit

L. LIN WOOD, JR.,

Plaintiffs-Appellants,

v.

BRAD RAFFENSPERGER, in his official capacity as Secretary of State of the State of Georgia, ANH LE, MATTHEW MASHBURN, REBECCA SULLIVAN, and DAVID WORLEY, in their official capacities as Members of the State Election Board, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.
No. 1:20-cv-05155 — Timothy C. Batten, Sr., *Judge*

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, counsel for State Appellees hereby certify that the Certificate of Interested Persons contained in Appellant's Initial Brief and Intervenor-Appellees' Response Brief is complete.

/s/ *Carey A. Miller*
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STATEMENT REGARDING ORAL ARGUMENT

The State Appellees do not request oral argument in this case. This case involves only application of well-settled principles of Article III standing and mootness. The facts and legal arguments are adequately presented in the briefs and the decisional process would not be significantly aided by oral argument.

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JURISDICTION

The district court exercised subject-matter jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1334. Defendants-Appellees (the "State Appellees") dispute that subject-matter jurisdiction exists because Plaintiff-Appellant L. Lin Wood, Jr., lacks standing under Article III of the United States Constitution, as the district court concluded.

Wood appeals from a final order of the district court, disposing of the case, which is generally reviewable under 28 U.S.C. § 1291. Here, however, not only does Wood lack standing but, as more fully explained in State Appellees' February 12, 2021 response to the Court's Jurisdictional Question, mootness deprives this Court of jurisdiction because this Court "'cannot turn back the clock and create a world in which' the [2021] election results are not certified." *Wood v. Raffensperger*, 981 F.3d 1307, 1317 (11th Cir. 2020) (quoting *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015)).

STATEMENT OF ISSUES

1. Whether the district court correctly held that the plaintiff lacks standing to pursue his claims.

2. Whether this action, which seeks to enjoin the challenged procedures and halt the January 2021 runoff, is now moot.

3. Whether the plaintiff's absentee-ballot-related claims are barred by the Eleventh Amendment.

4. Whether the district court correctly declined to enjoin the State's election procedures in the midst of early voting, weeks before election day.

STATEMENT OF THE CASE

In this case, Wood alleged that four different election procedures employed during the January 2021 runoff election burdened his right to vote in violation of the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution, and violated the Guarantee Clause, Art. IV, Sec. 4. [Doc. 1]. The same day his complaint was filed, Wood also filed emergency motions for injunctive relief and for expedited discovery. [Docs. 2 and 3]. Following a condensed briefing schedule, the district court held that Wood lacked standing to bring his claims, dismissing each claim for lack of jurisdiction and denying Wood's emergency motions. [Doc. 35]. Wood asks this court to review that dismissal.

A. Statutory and Regulatory Framework

The complaint challenges four different procedures utilized in the January 5, 2021 runoff election: (1) confirmation of absentee electors' identities by signature verification, conducted by county officials pursuant to O.C.G.A. § 21-2-386; (2) county officials' acceptance of absentee ballots by drop box pursuant to O.C.G.A. § 21-2-382 and Ga. Comp. R. & Regs. r. 183-1-14-0.8-.14; (3) early processing of absentee ballots by counties pursuant to O.C.G.A. § 21-2-386 and Ga. Comp. R. & Regs r. 183-1-14-0.9-.15; and (4) use

of the Dominion Ballot-Marking Device ("BMD") voting system (the "Dominion BMD System"). *See generally* [Doc. 1]. Those procedures are subject to state law and regulations which place the responsibility for their execution with local officials, and recent action by the General Assembly has amended the procedures except for use of the Dominion BMD System.

1. Acceptance and Processing of Absentee Ballots

Under the procedures applicable at the time of the district court's order, county election officials, upon receipt of each absentee ballot, were required to examine the signature on the oath (contained on the outer envelope of the ballot) and compare it to the signature on the voter's registration card or absentee ballot application. O.C.G.A. § 21-2-386(a)(1)(B) (2020). In the event the signatures did not match, county officials were required to "promptly notify" the voter of the discrepancy, and the voter is permitted to "cure the problem resulting in the rejection of the ballot" for up to three days following the election. O.C.G.A. § 21-2-386(a)(1)(C) (2020). Both were products of House Bill 316, Act 24 (2019).

In early 2020, while litigation seeking to prohibit the use of signature verification entirely was pending against the State, the State Election Board approved a rule establishing the contours of

"promptly notify." Ga. Comp. R. & Regs. r. 183-1-14-.13. Because the rule addressed the issues in the pending lawsuit, the parties resolved the matter in a settlement agreement that included, among other terms, the Secretary's issuance of guidance to county election officials regarding the signature verification process (an "Official Election Bulletin" or "OEB"). *See Democratic Party of Ga. v. Raffensperger*, 1:19-cv-05028-WMR, ECF No. 56-1 (Mar. 6, 2020).[1] As another judge in the Northern District described it, the OEB was a manifestation of the Secretary's statutory authority and provided "an additional safeguard to ensure election security by having more than one individual review an absentee ballot's information and signature for accuracy before the ballot is rejected." *Wood v. Raffensperger*, No. 1:20-cv-04651-SDG, 2020 WL 6817513 at *10 (N.D. Ga. Nov. 20, 2020) [hereinafter *Wood I*].

Under rulemaking authority granted to the State Election Board, O.C.G.A. § 21-2-31, and in light of the State of Emergency declared due to COVID-19, *see* O.C.G.A. § 50-13-4(b) (2020) (authorizing emergency rulemaking), the Board also adopted the drop-box and early-scanning emergency rules. Recognizing the

[1] This Court "may take judicial notice of its own records and the records of inferior courts." *United States v. Rey*, 811 F.2d 1453, 1457 n.5 (11th Cir. 1987).

challenges of conducting an election in a pandemic, those rules permitted counties to establish absentee ballot drop boxes (subject to certain security requirements, including video-monitoring) and to begin scanning absentee ballots prior to election day. Ga. Comp. R. & Regs. rr. 183-1-14-0.8-.14 and 183-1-14-0.9-.15.[2] Like the signature verification process, establishing drop boxes and processing or scanning absentee ballots prior to election day takes place at the direction of county officials. *See* O.C.G.A. §§ 21-2-382 (county registrars may establish additional sites for voting and receiving absentee ballots), -386 (processing and scanning of absentee ballots).

2. The Dominion BMD System

In 2019, the General Assembly adopted a new uniform system of voting throughout the State—moving the State away from the secure, but older, direct-recording electronic voting system to a voting system utilizing BMDs and optical scanners. House Bill 316, Act 24 (2019). The General Assembly directed this change be made "as soon as possible." O.C.G.A. § 21-2-300(a)(2). Following

[2] The emergency rules are *available at* https://sos.ga.gov/admin/files/Table%20of%20Contents%20for%20SEB%20Rule%20183-1-14-0.8-.14.pdf (drop box rule); and https://sos.ga.gov/admin/files/Table%20of%20Contents%20for%20SEB%20Rule%20183-1-14-0.9-.15.pdf (early scanning rule).

an open and competitive bidding process, the State procured the Dominion BMD System; the system is certified for use by the Secretary and by the United States Election Assistance Commission, as required by state law. O.C.G.A. §§ 21-2-300(a)(3); *see also* [Doc. 25 at 8–12 (discussing EAC and state certification)].[3] In addition to the adoption of a new voting system, House Bill 316 also required the State to implement risk-limiting audits, an audit protocol which uses statistical methods to limit the acceptable risk of certifying an incorrect outcome. O.C.G.A. § 21-2-498.

The Dominion BMD System generally consists of the BMD itself, on which a voter makes selections, and a connected printer which produces the ballot containing the voter's selection(s). *See* O.C.G.A. §§ 21-2-2(2) and (7.1). Those ballots are then tabulated by a separate optical scanner into which the paper ballot is deposited. Georgia law requires the Dominion BMD System be used in all county, state, and federal primaries and elections. O.C.G.A. § 21-2-300. Pursuant to the same statute, the State furnished the Dominion BMD System to each county, and those counties (or municipalities) may purchase or otherwise acquire

[3] Citations to the record refer to the document and page numbers generated by the district court's CM/ECF system. 11th Cir. R. 28-5.

additional equipment at their own expense. *Id.* at (a)(3). Ultimately, local officials are responsible for furnishing election equipment to polling places in their jurisdiction. O.C.G.A. § 21-2-70(4).

3. Senate Bill 202

During the 2021 legislative session, the Georgia General Assembly passed Senate Bill 202 ("SB 202"), a comprehensive elections bill that altered all but one of the practices challenged in this lawsuit and which was signed into law on March 25, 2021. While the substance of SB 202 is not before this Court, the changes contained therein are relevant to the mootness question, as Wood himself raised. *See* Resp. to Mot. to Supplement at 5, n.1.

Each of the procedures Wood challenges have been revised by SB 202, except the State's continued use of the Dominion BMD System. On verification of absentee voters' identity, SB 202 repeals the use of signature comparison and instead uses objective forms of identification—driver's license or state identification card numbers or the last four digits of social security numbers if a voter does not have a driver's license or state ID, along with the voter's date of birth. *See New Ga. Project v. Kemp*, No. 1:21-cv-01229-JPB, ECF No. 34-2 at 63:1564–64:1592 (N.D. Ga. May 3, 2021)

(provision of SB 202 amending O.C.G.A. § 21-2-386(a)(1)(B)).[4] The opportunity to cure nonmatching information remains. *Id.* at 64:1593–1612 (revising O.C.G.A. § 21-2-386(a)(1)(C)). SB 202 also contains legislative revisions regarding drop boxes, *id.* at 48:1172–1219 (amending O.C.G.A. § 21-2-382), and early processing of absentee ballots, *id.* at 66:1657–68:1717 (amending O.C.G.A. § 21-2-386(G)(2)). In all these circumstances, execution of these responsibilities remains with local election officials. *See* O.C.G.A. § 21-2-382 (Mar. 25, 2021) (requiring local officials establish at least one drop box with option for additional locations); O.C.G.A. § 21-2-386 (eff. July 1, 2021) (mandating local officials compare identifying information and authorizing local officials to process absentee ballots early).

[4] Citations to SB 202 refer to the CM/ECF page number and line numbers as filed in the U.S. District Court for the Northern District of Georgia. In addition to this Court's power to take judicial notice of records in its inferior courts, *supra*, n.1, it may also take judicial notice of legislative facts, *Lebron v. Sec'y, Fla. Dep't of Children & Families*, 772 F.3d 1352, 1371 (11th Cir. 2014), and a copy of the enacted version of SB 202 is publicly available. SB 202, Act 9, 2021-2022 Sess. (Ga. 2021), https://www.legis.ga.gov/legislation/59827.

B. Factual Background

This case concerns the procedures utilized in the 2021 runoff. This is not the first case in which Wood has asserted similar claims. Wood was the plaintiff in a prior suit in the Northern District of Georgia, *Wood I*, 2020 WL 6817513, *aff'd Wood v. Raffensperger*, 981 F.3d 1307 (11th Cir. 2021) [hereinafter *Wood I Appeal*], and counsel in another, *Pearson v. Kemp*, No. 1:20-cv-4809-TCB (N.D. Ga.). In the short period of time this case was pending in the district court, it generated a voluminous record, little of which was ever utilized to advance any argument. Many documents were borrowed from Wood's prior cases and another case pending in the Northern District of Georgia, *Curling v. Raffensperger*, No. 1:17-cv-2989 (N.D. Ga.), *appeals docketed* Nos. 20-13730 and 20-14067 (11th Cir.).

1. The November 2020 Election and Subsequent Challenges

Georgia held its general election on November 3, 2020. Following the counties' tabulation of the results, but prior to certification, the Secretary was required by law to designate a race to subject to a risk-limiting audit in accordance with O.C.G.A. § 21-2-498. *See also* Ga. Comp. R. & Regs. r. 183-1-15-.04. Recognizing the importance of clear and reliable results for such

an important contest, Secretary Raffensperger selected the presidential race for the audit. [Doc. 25-1].

Due to the relatively close margin of that race, the audit required local election officials to count by hand *all* absentee ballots and those printed by the BMDs (referencing the printed vote, not the QR code). *Id.* After the audit confirmed the outcome of the presidential election, *id.*, the Secretary certified the results and the Governor certified the slate of presidential electors. *Wood I Appeal*, 981 F.3d at 1313; *see also* O.C.G.A. § 21-2-499(b). Three races proceeded to a January 5, 2021 runoff: both United States Senate elections and the contest for Georgia Public Service Commission District 4. *See* O.C.G.A. § 21-2-501. Meanwhile, Wood's election litigation began in earnest, in the form of *Wood I* and *Pearson*, filed shortly after the November 3, 2020 election. The district courts in those cases both found lack of standing.

2. *Wood I* and *Wood I Appeal*

Wood first challenged the general election in *Wood I*, filing suit on November 13, 2020, under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, and the Electors and Elections Clauses of the Constitution, moving for the issuance of a temporary restraining order on the same basis. *Wood I*, 2020 WL 6817513 at *1–3. He

asserted that the State Appellees had violated those constitutional provisions by enforcing the signature verification OEB—purportedly diluting his vote and subjecting him to disparate treatment—and on the basis of observers' access to view the risk-limiting audit. *Id.* at *4. The district court in *Wood I* denied the motion for TRO, finding that Wood's allegations of standing—as a "qualified registered elector residing in Fulton County, Georgia" who had donated to various candidates on the ballot—fell "far short" of demonstrating standing to assert his claims. *Id.* at *5.

Relevant here, the *Wood I* court found that Wood's equal protection claim was a "textbook generalized grievance." *Id.* The court went on to find that even if he had standing, Wood failed to carry his burden of demonstrating the requisites for obtaining injunctive relief because (among other reasons) he did "not articulate a cognizable harm that invokes the Equal Protection Clause." *Id.* at *9; *see also, generally*, *id.* at *8–13. On appeal, this Court affirmed, holding that Wood asserted "only a generalized grievance" which does not establish injury in fact. *Wood I Appeal*, 981 F.3d at 1314. This Court also held that even if he had standing to pursue his claims, his "requests to delay certification and commence a new recount [were] moot" because the election had concluded and the results were certified. *Id.* at 1317.

3. *Pearson*

In *Pearson*, Wood (this time as counsel) took aim at the Dominion BMD System. In addition to challenging the signature verification OEB, the early-absentee-processing emergency rule, and observation of the risk-limiting audit, the *Pearson* plaintiffs alleged that the Dominion BMD System had been compromised by the regime of Hugo Chavez or otherwise manipulated by nefarious actors. *See generally*, *Pearson*, No. 1:20-cv-4809-TCB, ECF. No. 1 (N.D. Ga. Nov. 25, 2020). Ruling from the bench on December 23, 2020, the *Pearson* court dismissed those claims for, among other reasons, lack of standing because the plaintiffs "essentially alleged in their pleading that their interests are one and the same as any Georgia voter." [Doc. 25-2 at Tr. 43:23–25 (*Pearson* Hr'g Tr.)]. The *Pearson* plaintiffs appealed, but dismissed that appeal pursuant to FRAP 42.1. *Pearson v. Kemp*, No. 20-14579 (11th Cir. Jan. 19, 2021).

C. Course of Proceedings

1. Proceedings in the District Court

Wood filed his complaint in this case on December 18, 2020, as a "qualified, registered 'elector'" who "voted in person during the Presidential Election and ha[d] or [would] vote in the runoff election in-person." [Doc. 1 at 2 (¶ 3)]. The complaint sought to

revive Wood's challenge to the signature verification OEB from *Wood I* and the *Pearson* plaintiffs' challenge to the Dominion BMD System. [Doc. 1 at 5–10 (¶¶ 12–26), 19–24 (¶¶ 55–68)]. Wood also challenged the early processing of absentee ballots and use of drop boxes for absentee ballots. *Id.* at 10–13 (¶¶ 27–32), 13–18 (¶¶ 33–54). Wood's complaint speculates that the use of these challenged procedures "made it more likely that ballots without matching signatures would be counted," *id.* at 10 (¶24); resulted in "fraudulent votes" being cast, *id.* at 13 (¶ 32); made "it easier for political activists to conduct ballot harvesting," *id.* at 18 (¶ 50); and that the Dominion BMD System "manipulated the election results," *id.* at 24 (¶ 68).

In sum, Wood alleged that the challenged procedures would "have the effect of diluting [his] vote" and that he stood to suffer "disparate treatment of [his] vote" as an in-person voter in the 2021 runoff. [Doc. 1 at 26 (¶¶ 75–76)]. The legal bases for Wood's claims, as to all four of the challenged practices, are the Equal Protection (Count I) and Due Process (Count II) Clauses of the Fourteenth Amendment and the Guarantee Clause of the United States Constitution (Count III). [Doc. 1 at 25–31]. To remedy these purported violations, Wood sought "an emergency injunction halting Georgia's [then-upcoming] senatorial runoff election,"

[Doc. 1 at 4 (¶ 9)], and an order against State Appellees declaring the 2021 runoff procedures unconstitutional, "enjoining the use of said unconstitutional procedures in the runoff," and "awarding nominal damages if applicable." [Doc. 1 at 27, 28, 31]. On the same day his complaint was filed, Wood moved the district court to issue a TRO on the same bases, underscoring the thrust of his requested relief: enjoining use of the challenged procedures in the 2021 runoff. [Doc. 2 at 29 (¶1)].

The Democratic Party of Georgia and Democratic Senatorial Campaign Committee moved to intervene in the case shortly after Wood's complaint was filed. [Doc. 13]. Notwithstanding their prior challenges to some of the same provisions, *see, e.g.*, *New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265 (N.D. Ga. 2020), *injunction stayed*, 936 F.3d 1278 (11th Cir. 2020), *Democratic Party of Ga.*, No. 1:19-cv-05028-WMR (N.D. Ga.), *Curling v. Raffensperger*, No. 1:17-cv-2989-AT (N.D. Ga.), they moved to dismiss Wood's complaint. [Doc. 14]. The State Appellees also moved to dismiss Wood's complaint and responded to his TRO motion in consolidated filings, [Docs. 25 and 26], arguing that Wood lacked standing (among other jurisdictional and procedural defects). *See* [Doc. 25 at 12–18 (arguing lack of standing and collateral estoppel), 18–24 (asserting Eleventh Amendment,

justiciability, and failure to state a claim)]. On the merits, State Appellees contested Wood's use of multiple filings from the *Curling* litigation and pointed to the risk-limiting audit which forecloses Wood's vote-flipping or weighted algorithm theories. *Id.* at 8–12. Wood failed to respond to any of State Appellees' arguments on the merits. *See* [Doc. 33 at 24].

Following briefing, the district court issued a twenty-page order dismissing Wood's complaint and denying the TRO motion. [Doc. 35]. Specifically, the court determined: (1) Wood's vote dilution allegation was a generalized grievance, insufficient to confer standing, *id.* at pp. 7–11; (2) his disparate treatment allegation did not constitute an injury because Wood did "not show that he suffered from discrimination or other harm as a result of his classification as an in-person voter," *id.* at p. 12; (3) that both such allegations were "far too conclusive and speculative to satisfy Article III's 'concreteness' requirement," *id.* at p. 13; (4) his due process allegations were "paradigmatic generalized grievances unconnected to Wood's individual vote," *id.* at p. 18; (5) Wood's equal protection claim was barred by collateral estoppel, *id.* at 7, n.5; (6) Wood did not demonstrate traceability and redressability as to the State Appellees, *id.* at 17, n.6; and (7) with respect to Wood's Guarantee Clause claim, the claim was non-justiciable but,

even if it were, Wood lacked standing because the clause did not confer rights to him as a Georgia voter. *Id.* at 19–20 (citing *Largess v. Supreme Jud. Ct. for the State of Mass.*, 373 F.3d 219, 224 n.5 (1st Cir. 2004)).

2. Proceedings on Appeal

Wood filed a notice of appeal from the district court's order the same day, [Doc. 37], and also sought an extraordinary writ of mandamus in the United States Supreme Court, seeking "to halt the January 5, 2021 senatorial runoff election." Emergency Pet. for Writ of Mandamus at 1, *In Re L. Lin Wood, Jr.*, No. 20-887 (U.S. Jan. 4, 2021). The Supreme Court denied that petition. *See* Order List at 5, *available at* https://www.supremecourt.gov/orders/courtorders/030821zor_8n59.pdf (U.S. Mar. 8, 2021). In the meantime, the 2021 runoff came and went without any further action from Wood. Recognizing this issue, this Court issued a jurisdictional question concerning whether this appeal is moot, to which the parties responded on February 12, 2021. Wood then filed his merits brief, after his motion for extension of time was granted.

On appeal, and while appellees' briefing deadlines were stayed pursuant to 11th Cir. R. 31-1, the State Appellees moved for leave to supplement the record on April 12, 2021. The motion

sought to include three documents in the record of this appeal: (A) Wood's Georgia voter history showing that he did not vote in the 2021 runoff; (B) voter registration records obtained from the South Carolina State Election Commission showing Wood is now registered to vote there; and (C) portions of Wood's complaint from the case *Wood v. Frederick*, No. 1:21-cv-1169-TCB, ECF No. 1 (N.D. Ga. Mar. 23, 2021), in which Wood alleges his current South Carolina residency. Mot. to Supplement, Exs. A, B, and C. That motion remains pending.

Meanwhile, despite disregarding lack of service in his response to State Appellees' motion to dismiss, [Doc. 33 at 17, n.1], Wood failed to complete service in the 81 days since. Wood moved to extend the time for service while this appeal was pending, [Doc. 41], which the district court denied, [Doc. 42]. Wood has filed a separate appeal from that order. *See* [Doc. 43]; 11th Cir. Dkt. No. 21-11330.

D. Standard of Review

Federal courts have an independent obligation to ensure themselves of jurisdiction, and appellate courts review decisions on jurisdictional issues, like standing, mootness, and Eleventh Amendment immunity, *de novo*. *Wood I Appeal*, 981 F.3d at 1313 (quoting *United States v. Lopez*, 562 F.3d 1309, 1311 (11th Cir.

2009)). Because "[f]ederal courts are courts of limited jurisdiction," it is presumed that a cause of action "lies outside this limited jurisdiction . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citing *Turner v. Bank of N. Am.*, 4 U.S. 8, 11 (1799) and *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182–183 (1936)). When considering subject matter jurisdiction, "consideration of all relevant information is necessary to make an informed decision." *Cabalceta v. Std. Fruit. Co.*, 883 F.2d 1553, 1555 (11th Cir. 1989); *see also Universal Express, Inc. v. United States Secs. & Exch. Comm'n*, 177 F. App'x 52, 53–54 (11th Cir. 2006) (affirming district court's dismissal for lack of subject matter jurisdiction based on matters beyond the pleadings and judicially noticed facts).

This Court need not, and does not, reach the merits or mootness of an appeal unless standing is established. *Gardner v. Mutz*, 962 F.3d 1329, 1338 (11th Cir. 2020); *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93–94 (1998) (disapproving cases reaching merits over jurisdictional objection). As a general matter, this Court does not ordinarily have jurisdiction to review TRO rulings. *Pearson v. Kemp*, 831 F. App'x

467, 471 (11th Cir. 2020). Where this Court does exercise such jurisdiction, it will reverse the denial of a TRO "only if the district court applies an incorrect legal standard, or applies improper procedures, or relies on clearly erroneous factfinding, or if it reaches a conclusion that is clearly unreasonable or incorrect." *Schiavo ex re. Schindler v. Schiavo*, 403 F. 3d 1223, 1226 (11th Cir. 2005) (citations omitted).

SUMMARY OF ARGUMENT

In this case, Wood seeks to apply claims raised and rejected by other courts, including this Court in *Wood I Appeal*, and piggyback off discredited conspiracy theories rejected by the *Pearson* and *Wood I* district courts and pursued by the plaintiffs in *Curling*. These claims merit no further attention when transposed to the 2021 runoff election.

As this Court has already made clear, Wood's allegations of illegal activity of third-parties are far too speculative to warrant intervention of the federal courts. Further, his allegations are unconnected to *his* personal interests and *his* vote, much less traceable to or redressable by an injunction against the State Appellees. These are the same problems which led to dismissal of Wood's prior claims and those of the *Pearson* plaintiffs, yet Wood does not even try to distinguish those cases. In any event, Wood

did not vote in the 2021 runoff and thus had no vote which could possibly have been diluted or disparately treated as he claims.

Even if Wood had standing for any of these claims, other jurisdictional bars apply: mootness and the Eleventh Amendment. Wood repeatedly made clear in his complaint and TRO motion that he sought relief for the 2021 runoff, but that election has come and gone, and he cannot "update" his claims on appeal. Moreover, Wood admits that SB 202 has materially changed most of the procedures he challenges. And Wood cannot demonstrate this suit is capable of repetition yet evading review: he has failed to establish a reasonable likelihood that he will leave South Carolina, return to Georgia, vote in a forthcoming election, be subject to procedures no longer authorized by state law, and seek the same relief. Nor does Wood's claim for nominal damages save his suit—he suffered no injury, as the district court correctly concluded, and could not have since, again, *he did not vote*.

Finally, although this Court need not pass on it, the district court did not err in declining to halt the 2021 runoff, weeks before election day and in the midst of early voting. Not only do the jurisdictional defects bar this relief, but Wood's allegations are not plausible, and he failed to carry his burden of demonstrating the requisites for obtaining such relief. For these reasons, the district

court did not err in dismissing Wood's suit and this Court should summarily affirm that decision.

ARGUMENT

I. Wood lacks Article III standing.

"Federal courts are not 'constituted as free-wheeling enforcers of the Constitution and laws.'" *Wood I Appeal*, 981 F.3d at 1313 (quoting *Initiative and Referendums Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (en banc)). Instead, Article III, Sec. 2, cl. 1 of the U.S. Constitution requires a litigant to establish he or she has standing by proving "(1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1245 (11th Cir. 2020) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Here, the district court properly concluded that Wood lacks standing to pursue his latest claims. Wood lacks an injury in fact, whether viewed as pled or in light of the supplemental material. And even if he did establish an injury, he cannot establish traceability or redressability.

A. Wood lacks an injury in fact sufficient to confer standing.

"To establish an injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, --- U.S. ---, 136 S. Ct. 1540, 1548 (2016) (citing *Lujan*, 504 U.S. at 560). As to particularity, the alleged injury must "affect the plaintiff in a personal and individual way," *id.* at 1548, "[a] generalized grievance [that] is undifferentiated and common to all members of the public" will not suffice. *Wood I Appeal*, 981 F.3d at 1314. Under this binding precedent, Wood's alleged injury is insufficient to establish an injury in fact: he does not (and cannot) allege how *he* will be (or was) personally injured other than his general disagreement with the challenged procedures. Moreover, his theories of injury are too speculative and hypothetical to constitute an injury for purposes of standing. Regardless, the supplemental material forecloses any possibility that Wood suffered an injury.

1. Wood does not allege an injury in fact sufficient to confer standing for his claims.

In support of his equal protection claim, Wood alleges that as an in-person voter in the 2021 runoff he would be injured by way

of vote dilution or arbitrary and disparate treatment. [Doc. 1 at 26 (¶¶ 75–76)]. And to support his due process claim (both procedural and substantive), Wood simply states, without elaboration, that the challenged procedures amount to a violation. *Id.* at 28 (¶82). Wood's allegations in both cases fail to assert harm particularized to him. Finally, in addition to offering the same vague assertions to support his Guarantee Clause claim, it fails for a different reason: the clause confers rights only to the states, not individuals.

a. Equal Protection

Wood knows he has failed to allege an injury sufficient to confer standing for his Equal Protection claim, because he asserted the same claim in *Wood I*, and both the district court and this Court found that injury insufficient. There, as here, Wood claimed that "because Defendants allegedly did not follow the correct processes, invalid absentee votes may have been cast and tabulated, thereby diluting [his] in-person vote." *Wood I*, 2020 WL 6817513 at *5; *see also id.* at *1 (quoting Wood's allegation of disparate treatment on the same basis).[5] There, as here, the

[5] As the district court noted in this case, Wood's equal protection claim as to the signature verification OEB is also precluded by collateral estoppel because the *Wood I* court "and the Eleventh Circuit recently concluded Wood lacked standing to bring almost

district court held that this allegation was "a textbook generalized grievance," *id.* at *5 (citing *Bognet v. Sec'y of Pennsylvania*, 980 F.3d 336, 356 (3rd Cir. 2020), *vacated as moot*, 2021 WL 1520777 (U.S. Apr. 19, 2021)), and this Court affirmed for the same reason on appeal. *Wood I Appeal*, 981 F.3d at 1314 ("Wood asserts only a generalized grievance"). This case is no different.

On vote dilution, this Court explained that "vote dilution can be a basis for standing … but it requires a point of comparison." *Id.* Wood offers nothing different here than he did before, and his claims—whether rooted in the signature verification OEB, the emergency rules, or the Dominion BMD System—do not demonstrate how *he* "is specifically disadvantaged if a vote is counted improperly, even if the error might have a mathematical impact on the final tally and thus on the proportional effect of every vote. Vote dilution in this context is a paradigmatic generalized grievance that cannot support standing." *Id.* (quoting *Bognet*, 980 F.3d at 356) (internal marks omitted). Wood fails to even address his prior appeal to this Court. Nor does Wood

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identical claims." [Doc. 35 at 7, n.7]. This prior determination "adjudicate[s] the court's jurisdiction, and a second complaint cannot command a second consideration of the same jurisdictional claims." *Id.* (quoting *N. Ga. Elec. Membership Corp. v. City of Calhoun*, 989 F.2d 429, 433 (11th Cir. 1993)).

address the district court's finding in this case that "[c]ourts have consistently found that a plaintiff lacks standing where he claims that his vote will be diluted by unlawful or invalid ballots." [Doc. 35 at 9–10 (collecting cases)].

Baker v. Carr, 369 U.S. 186 (1962), Appellant's Br. at 34, does not require a different result. To the contrary, "the Supreme Court noted the distinction between 'a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the Government be administered according to the law.'" *Curry v. Baker*, 802 F.2d 1302, 1312 n.6 (11th Cir. 1986) (quoting *Baker*, 369 U.S. at 208) (internal marks omitted). Wood's claims here fall in the latter category.

Similarly, Wood's disparate-treatment theory of injury does not move the needle. On the signature verification OEB and the emergency rules, Wood pursues another theory that this Court previously told *him* was insufficient. *See, e.g.*, Appellants' Br. at 34 (discussing that in-person voters were subject to one set of rules while absentee voters were subject to others). "His allegation, at bottom, remains 'that the law ... has not been followed,'" which is insufficient to confer injury by way of arbitrary and disparate treatment. *Wood I Appeal*, 981 F.3d at 1315

(quoting *Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324, 1332 (11th Cir. 2007)). Wood does not attempt to differentiate himself from other Georgians and, consequently, does not demonstrate an injury particularized to him. Instead, as to all of his claims, he reiterates the alignment of interests between him and every other Georgian. Appellant's Br. at 12 ("[I]f the same challenged election procedures are employed in future elections, the Appellant (and the citizens of Georgia) will be permanently harmed . . ."). As before, Wood's alleged injury here is "undifferentiated and common to all members of the public." *Wood I Appeal*, 981 F.3d at 1314 (quoting *Lujan*, 504 U.S. at 575). Consequently, the district court's order should be affirmed because "the Supreme Court has made clear" such generalized grievances, "no matter how sincere," cannot support standing. *Id.* (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) (quotation marks omitted).

b. Due Process

Wood does not assert a different form of injury to support his procedural and substantive due process claims, or explain *how* his right to due process was (or will be) violated: Wood simply alleges that the challenged procedures will be utilized and he will therefore suffer harm. *See* [Doc. 1 at 27–28 (¶¶ 80–83)]. Here too, Wood doubles down on the alignment of his interests with those of

"any individual citizen's" interest. Appellant's Br. at 37. This purported injury, which "merely seeks to protect an asserted interest in being free of an allegedly illegal electoral system," is not a cognizable injury for purposes of standing. *Dillard*, 495 F.3d at 1333. Accordingly, the district court did not err in deciding that Wood lacked standing to pursue his due process claims. [Doc. 35 at 18 (finding Wood's claims were "paradigmatic generalized grievances unconnected to Wood's individual vote.")]; *see also Nolles v. State Comm. for Reorganization of Sch. Dists.*, 524 F.3d 892, 898–901 (8th Cir. 2008) (finding plaintiffs lacked standing to pursue procedural and substantive due process claims concerning conduct of referendum and discussing *Dillard*).

c. Guarantee Clause

Wood has not alleged an injury to confer standing for his novel Guarantee Clause claim either. Starting with the text, the Clause provides:

> *The United States* shall guarantee *to every State* in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. Art, IV, Sec. 4 (emphasis added). The clause thus makes this guarantee "*to the states*; the bare language of the

Clause does not directly confer any rights on individuals vis-á-vis the states," it confers rights only to the states and an obligation of the federal government. *Largess v. Supreme Jud. Ct. for the State of Mass.*, 373 F.3d 219, 224 n.5 (1st Cir. 2004) (emphasis in original); *see also* The Federalist No. 43 (James Madison) (U.S. Bicent. Ed.), 1788 WL 457 at *3 (explaining that the federal government would be bound to pursue its authority to guarantee a republican form of government). Accordingly, the district court correctly concluded that Wood, as a citizen, lacks standing to pursue a claim under the Guarantee Clause. [Doc. 35 at 19–20]. Moreover, even if the clause did confer standing to an individual, the Supreme Court "has several times concluded … that the Guarantee Clause does not provide the basis for a justiciable claim," *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019), and Wood's claim would *still* be rooted in the generalized grievances discussed above.

2. Wood's alleged injury is purely conjectural and speculative, not concrete nor certainly impending.

In addition to failing to show that his alleged injuries are specific to him, Wood has failed to show they are concrete or certainly impending, as Article III requires. "A 'concrete' injury

must be '*de facto*'; that is, it must actually exist." *Spokeo*, 136 S. Ct. at 1548 (citing Black's Law Dictionary 479 (9th ed. 2009)). And to obtain relief for threatened future injuries, a plaintiff must establish that such an injury is "certainly impending." *Indep. Party of Fla. v. Sec'y, State of Fla.*, 967 F.3d 1277, 1280 (11th Cir. 2020). Wood's allegations fail on both accounts: his allegations presuming the illegal acts of nefarious third parties are "bald assertions that rest on mere supposition." *Bognet*, 980 F.3d at 362.

To suffer the harm Wood alleges in support of his absentee ballot claims, the district court's order noted that a complex chain of events would need to occur: "manipulation of signature-comparison procedures, abuse of ballot drop boxes, intentional mishandling of absentee ballots, and exploitation of Dominion's voting machines." [Doc. 35 at 14]. Wood has not plausibly alleged that any of this has actually occurred, much less that it occurred and affected *his* vote. And the Supreme Court has expressed its "reluctance to endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper v. Amnesty Int't USA*, 568 U.S. 398, 414 (2013). The *Clapper* Court's reluctance is particularly apt here, where the alleged injury will only occur if "independent actors make decisions to act *unlawfully*." *Bognet*, 980 F.3d at 362 (emphasis in original) (citing

City of Los Angeles v. Lyons, 461 U.S. 95, 105–106 and 106 n.7 (1983)).

Wood's reliance on the *Curling* litigation does not resolve the speculative and conjectural nature of his claims regarding the Dominion BMD System either. First, *Curling* has never proceeded to formal discovery, summary judgment, or trial—its orders come from hearings on nine different preliminary-injunction motions in which the evidentiary burden is significantly lowered. Second, the district court in *Curling* has itself recently called into question whether those plaintiffs have standing. No. 1:17-cv-2989-AT, ECF Nos. 1049, 1060. Third, the *Curling* plaintiffs have never alleged any actual hack or manipulation of the Dominion BMD System, only purported vulnerabilities and speculation. Finally, the first order cited in Wood's complaint concerns a system no longer in use, [Doc. 1 at 19 (citing *Curling v. Kemp*, 344 F. Supp. 3d 1303 (N.D. Ga. 2018)], and the other order he relies upon, *Curling v. Raffensperger*, 493 F. Supp. 3d 1264 (2020), declined to enjoin use of the BMDs and is pending appeal in this Court for review of those plaintiffs' standing, 11th Cir. Dkt. No. 20-14067.[6]

[6] Further, a motions panel of this Court stayed another order of the *Curling* court, 491 F. Supp. 3d 1289 (N.D. Ga. 2020), arising out of the same hearing and applying the same reasoning. No.

3. Even if Wood sufficiently pled an injury, the supplemental documents conclusively demonstrate he was not injured.

Notwithstanding the sound reasoning of the district court's order, subsequent events confirm—beyond any doubt—that Wood suffered no injury and will not in the future. As discussed, Wood's complaint is premised on his status as an in-person voter for the 2021 runoff, [Doc. 1 at 2 (¶ 3)], alleging *that* vote would be diluted or disparately treated, *id.* at 26 (¶¶ 75–76). Now, however, it is undisputed that Wood *did not vote* in the 2021 runoff. *See* Mot. to Supplement Ex. A; Reply in Support of Mot. at 2 (noting that Wood did not contest accuracy of the supplemental documents).

Wood's decision not to vote precludes any injury he has alleged (even if it were particularized, concrete, and imminent). Wood had no vote which was allegedly diluted; had no status as an in-person voter which allegedly subjected him to disparate treatment; and his right to vote was not otherwise burdened as he alleged it would be because it was never exercised. Accordingly, Wood's purported injury does not "actually exist." *Spokeo*, 136 S.

20-13730-RR, 2020 WL 6301847 (11th Cir. Oct. 24, 2020). That panel later explained that the *Curling* district court "almost certainly erred as a matter of law in imposing the injunction." *Curling v. Raffensperger*, No. 20-13730-RR, Order Denying Mot. to Lift Stay at 3 (11th Cir. Apr. 1, 2021).

Ct. at 1548. Nor could even the most expansive reading of the Guarantee Clause confer standing to Wood in light of the supplemental materials, since Wood is now a resident and registered voter of South Carolina, Mot. to Supplement Exs. B and C, not a Georgia citizen seeking to require Georgia adhere to a republican form of government.

B. Wood's purported injury is neither traceable to State Appellees nor redressed by an order against them.

Finally, even if Wood had alleged an injury in fact, the district court did not err in its alternative holding that his claims fail to satisfy Article III's traceability and redressability requirements. [Doc. 35 at 17 n.6]. "To satisfy the causation requirement of standing, a plaintiff's injury must be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Jacobson*, 974 F.3d at 1253 (quoting *Lujan*, 504 U.S. at 560). Further, "it must be the effect of the court's judgment on the defendant—not an absent third party—that redresses the plaintiff's injury, whether directly or indirectly." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019) (internal quotations

omitted). Just like the plaintiffs in *Jacobson* and *Lewis*, Wood cannot meet this standard.

On the challenged absentee-ballot practices, those responsibilities fall to local election officials. The emergency rules merely *permitted* local officials to establish drop boxes or process absentee ballots early; it was up to those county officials to decide whether to do so. And it is those local officials who also conduct absentee identity verification. A motions panel of this Court determined the same, holding that claims alleging vote-dilution and arbitrary or unequal application of absentee identity verification were not fairly traceable to or redressed by an order against the Secretary of State and State Election Board. *Ga. Republican Party v. Sec'y of State for Ga.*, No. 20-1471-RR, 2020 WL 7488181 (11th Cir. Dec. 21, 2020).

Similarly, Wood's speculation about absentee-ballot fraud and his discredited allegation that the Dominion BMD System was manipulated by foreign actors to switch votes are both traceable only to those independent third parties who are not before the Court. Only they could have caused Wood's alleged injuries and that is insufficient to establish traceability to the State Appellees. *See Lujan*, 504 U.S. at 560–61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)). Moreover, even if State

Appellees were enjoined from mandating use of the Dominion BMD System, such an injunction would not prevent 159 non-party Georgia counties from utilizing the system or otherwise employing some other system that Wood believes has also been rigged by non-party despots. The State provides BMDs to county officials, O.C.G.A. § 21-2-300(a)(3), but those county officials may purchase their own equipment, *id.*, and are ultimately responsible for furnishing such equipment to polling places, O.C.G.A. § 21-2-70(4). And federal courts may only enjoin the officials before them from enforcing a statute. *Jacobson*, 974 F.3d at 1255.

II. Wood's requested relief is moot.

Even if Wood had standing when he filed this suit, his requests for relief must now be dismissed as moot. As this Court explained in *Wood I*, "mootness concerns the availability of relief, not the existence of a lawsuit or an injury." *Wood I Appeal*, 981 F.3d at 1317. Here, the relief Wood sought, halting the 2021 runoff, is no longer available; that election has come and gone. And, as Wood himself acknowledges: SB 202 "revised the State's election laws, which specifically addressed the allegations and causes of action in [his] complaint." Resp. to Mot. to Supplement at 5 n.1. Finally, Wood's case does not fit within any exception to

the mootness doctrine and he cannot rely on his claim for nominal damages to save this case from mootness.

A. The 2021 runoff has concluded, mooting Wood's request for injunctive relief.

As explained in State Appellees' response to this Court's jurisdictional question, Wood's requested relief is no longer available and this case is moot. "An issue is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Wood*, 981 F.3d at 1317 (quoting *Christian Coal. of Fla., Inc. v. United States*, 662 F.3d 1182, 1189 (11th Cir. 2011)) (marks omitted). This can happen "at any stage of litigation, even if there was a live case or controversy when the lawsuit began." *Id*. Wood's complaint sought an emergency injunction halting the 2021 runoff election, [Doc. 1 at 4 (¶ 9)], and an order declaring the 2021 runoff procedures unconstitutional, "enjoining the use of said unconstitutional procedures in the runoff" and "awarding nominal damages if applicable." [Doc. 1 at 27, 28, 31]. Wood underscored his focus on the 2021 runoff in his TRO motion too: seeking to enjoin the challenged procedures in the *2021 runoff*. [Doc. 2 at 29 (¶1)].

Each of these requests for relief are now moot. The 2021 runoff results have been certified and the officers elected have

assumed their terms. This Court "cannot turn back the clock and create a world in which" the 2021 runoff has not concluded. *Wood I Appeal*, 981 F.3d at 1317 (quoting *Fleming*, 785 F.3d at 445) (internal marks omitted).

Further, and unaddressed in State Appellees' response to the jurisdictional question, Wood himself raised an alternative reason this appeal is moot: the challenged procedures (other than use of the Dominion BMD System) have now been altered by SB 202. And "in the absence of evidence indicating that the government intends to return to its prior legislative scheme, repeal of an allegedly offensive statute moots legal challenges to the validity of that statute." *Nat'l Adver. Co. v. City of Miami*, 402 F.3d 1329, 1334 (11th Cir. 2009). "Given that [SB 202] encompasses comprehensive electoral reforms, and is not merely a legislative fix" seeking to address Wood's claims, this Court "cannot conclude that the Georgia Legislature would go back to the old electoral system if this appeal were dismissed as moot." *United States v. Georgia*, 778 F.3d 1202, 1205 (11th Cir. 2015); *see also Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 594 (11th Cir. 2013) (noting that "voluntary cessation by a government actor gives rise to a rebuttable presumption that the objectionable behavior will not recur").

Wood argues that "the controversy is not moot for if the result is permitted to stand, and if the same challenged election procedures are employed in future elections, the Appellant (and the citizens of Georgia) will be permanently harmed by the Defendants' infringement on Appellant's voting rights." Br. at 12. Setting aside Wood's concession that SB 202 addresses his claims, this argument reflects a misunderstanding of his own complaint. First, Wood has not pled an election contest claim and does not request "de-certification" of the results or similar relief. Just as before, this Court cannot turn his request to halt the 2021 runoff into one now seeking to contest its results. *Wood I Appeal*, 981 F.3d at 1317. Second, Wood did not seek to enjoin *any* procedure for elections other than the 2021 runoff. Wood's requests for relief must be confined to those made in his Complaint and heard by the district court. Indeed, the district court "must first have the opportunity to pass upon [every] issue." *S.F. Residence Club, Inc. v. 7027 Old Madison Pike, LLC*, 583 F.3d 750, 755 (11th Cir. 2009). Wood cannot now seek different relief for the first time on appeal. *Wood I Appeal*, 981 F.3d at 1317.

B. Neither exceptions to the mootness doctrine nor Wood's claim for nominal damages saves this appeal from mootness.

Wood contends this appeal "fits squarely within the exception to mootness as a case involving an issue capable of repetition yet evades review." Br. at 29.[7] Setting aside the dispositive effect of the enactment of SB 202, Wood's argument here is inapposite. Moreover, Wood's assertion that nominal damages saves this appeal from mootness is unavailing because Wood has not established injury and traceability.

To be "capable of repetition yet evading review," there must "be a reasonable expectation or a demonstrated probability that the *same controversy* will recur involving the *same complaining party*." *Sierra Club v. Martin*, 110 F.3d 1551, 1554 (11th Cir. 1997) (emphasis added). The exception is narrow and is only applicable in "exceptional situations." *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1335 (11th Cir. 2001). Further, the "remote possibility that an event might recur is not enough to overcome mootness." *Id*.

[7] State Appellees' response to the Court's jurisdictional question addresses other exceptions to mootness; Wood does not rely on any of those in his principal brief.

Here, there is no "reasonable expectation or demonstrated probability" of recurrence. *Sierra Club*, 110 F.3d at 1554. First, as discussed, Wood's complaint is specific to the 2021 runoff and that election simply will not recur. Moreover, even if his complaint were construed to encompass future elections, SB 202 has abrogated nearly all of the challenged procedures. Even setting aside SB 202, Wood cannot demonstrate he is likely to seek the same draconian relief. *Wood I Appeal*, 981 F.3d at 1317–18 (holding there is no reasonable expectation Wood will again seek to delay certification). This is especially true in light of the proffered supplemental material showing that Wood now resides in South Carolina and is a registered voter there. Mot. to Supplement, Exs. B and C. Indeed, to conclude otherwise would require determining that Wood will contravene his sworn present intention to remain in South Carolina, S.C. Code Ann. §§ 7-1-25, 7-5-170 and 7-5-180 (defining residence and requiring an oath to register), return to Georgia, and vote in a Georgia election. This is not a "reasonable expectation under all the circumstances," *Hall v. Sec'y State of Ala.*, 902 F.3d 1294, 1300 (11th Cir. 2018).

Finally, Wood's claim for "nominal damages if applicable" does not preserve a live case or controversy here, and his reliance on the Supreme Court's recent decision in *Uzuegbunaum v.*

Preczewski, --- U.S. ---, 141 S. Ct. 792 (2021), is misplaced. Br. at 12–13. In *Uzuegbunaum*, the Supreme Court "granted certiorari to consider whether a plaintiff who sues over a *completed* injury *and establishes the first two elements of standing* (injury and traceability) can establish the third by requesting only nominal damages." *Id.* at 797 (emphasis added).

Here, as discussed at length in this brief, Wood did not bring suit to vindicate a completed injury, he sought an injunction to avoid an alleged prospective injury. Moreover, in *Uzuegbunaum*, it was "undisputed that Uzuegbunam experienced a completed violation of his constitutional rights," *id.* at 802, and the Court did not decide whether another plaintiff in that case could pursue nominal damages which are "unavailable where a plaintiff has failed to establish a past, completed injury," *id.* at n.*. Wood finds himself in the shoes of the plaintiff whose request for nominal damages is unavailable: as discussed in Section I, *supra*, the district court properly concluded that Wood did not suffer an injury and did not establish traceability. Nor can Wood avoid this reality by convincing this Court to eschew the sound reasoning of the district court's order: no injury ever occurred, as demonstrated by the supplemental material.

III. The Eleventh Amendment precludes Wood's absentee ballot claims.

Wood's complaint and his brief in this Court allege the challenged practices, at least those regarding absentee ballots, contravene state law.[8] But the Eleventh Amendment bars such suits to determine state law. *See Kentucky v. Graham*, 473 U.S. 159, 169 (1985). While *Ex Parte Young*, 209 U.S. 123 (1908), provides an exception to Eleventh Amendment immunity, it does so only for prospective injunctive relief grounded in a violation of *federal* law. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105–106 (1984). In other words, "the *Young* doctrine rests on the need to promote the vindication of *federal* rights," and is "inapplicable in a suit against state officials on the basis of *state* law." *Id.* at 105–106 (emphasis added). And courts must look to "the effect of the relief sought" to determine whether it exceeds *Ex Parte Young*. *Id.* at 107.

[8] This Court need not address the argument raised in Wood's appellate brief concerning the Elections Clause, U.S. Const. art. I, § 4, cl. 1. Br. at 38–43. Wood never asserted an Elections Clause claim below and "if a party hopes to preserve a claim, argument, theory, or defense on appeal, she must first clearly present it to the district court ... to afford the district court an opportunity to recognize and rule on it." *Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089, 1110–11 (11th Cir. 2020).

Here, notwithstanding Wood's nominal reference to constitutional provisions, the effect of the relief sought is essentially a declaratory judgment on whether enforcement of the challenged procedures is consistent with state law. Indeed, Wood underscores this "effect" in his brief, discussing the Georgia Supreme Court's holdings regarding the non-delegation doctrine—under the *Georgia* Constitution. Br. at 38–40. In other words, "the gravamen of [Wood's] complaint" is that the State Appellees have not adhered to state law, a decision beyond the bounds of *Ex Parte Young*. *Dekalb Sch. Dist. v. Schrenko*, 109 F.3d 680, 688 (11th Cir. 1997); *see also Fair Fight Action, Inc. v. Raffensperger*, 1:18-cv-05391-SCJ, ECF No. 188 (N.D. Ga. Dec. 27, 2020).[9]

IV. The district court did not otherwise err in dismissing Wood's complaint and refusing to grant Wood's requested relief in the midst of the Runoff.

This Court need not proceed beyond whether subject matter exists to entertain Wood's suit, but even if it does, Wood's claims and TRO Motion still fail.[10] Wood has failed to meet his burden of

[9] This order may also be found in the record of this case at [Doc. 25-3].

[10] Because the district court dismissed the suit for lack of standing and did not address the merits of the TRO motion, this Court should not either. *See Nicholson v. Shafe*, 558 F.3d 1266, 1279 n.13 (11th Cir. 2009) ("We will not address an issue that has not

establishing the necessary requirements: (1) substantial likelihood of success on the merits of his claims; (2) irreparable injury absent the injunction; (3) that the threatened injury to him outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that the injunction would not be adverse to the public interest. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). Indeed, the injunction Wood sought is "an extraordinary and drastic remedy not to be granted unless the movant *clearly established* the burden of persuasion as to the four requisites." *Id.* at 1306 (emphasis added). He cannot do so.

A. Wood's complaint fails to state a claim and, even if it did, he cannot demonstrate likelihood of success on the merits.

Wood's complaint fails to state a claim for which relief may be granted and he cannot show he is likely to succeed on it. This is alone is fatal to his TRO request. *See Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005) (demonstrating a substantial likelihood of success on the merits "is generally the most important").

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been decided by the trial court.") (citing *Baumann v. Savers Fed. Sav. & Loan Ass'n*, 934 F.2d 1506, 1512 (11th Cir. 1991)).

1. Wood's complaint fails to state a claim.

The pleading requirements of Rule 8 demand more than "labels and conclusions" and "'naked assertions' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–557 (2007)). Instead, a complaint must contain sufficient factual content that, if accepted as true, is facially plausible which demands more than a "sheer possibility that a defendant has acted unlawfully." *Id.*

Wood's complaint fails to meet the plausibility standard. The factual allegations Wood asserts, including Dominion's founding by "foreign oligarchs and dictators" in a "criminal conspiracy" seeking to ensure "Venezuelan dictator Hugo Chavez never lost another election," [Doc. 1 at 19-20 (¶¶56–57)], are wholly unsupported by well pleaded factual allegations. Even under the most generous reading, these bizarre allegations fail to "nudge[] [his] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

2. Wood did not, and cannot, demonstrate a likelihood of success on the merits.

As a starting point, Wood's lack of standing forecloses a finding that he is likely to succeed on the merits of his claims. *See*

EPIC v. U.S. Dep't of Commerce, 928 F.3d 95, 104 (D.C. Cir. 2019) ("The merits on which plaintiff must show a likelihood of success encompass not only substantive theories but also establishment of jurisdiction."); *accord Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1350–55 (11th Cir. 2005) (evaluating standing on appeal from grant of interlocutory injunction). Moreover, the risk-limiting audit, which expanded to *a full hand recount of all ballots cast*, [Doc. 25-1], precludes any possibility that Wood could show a likelihood of proving his allegations that "the votes tallied by the Dominion system do not represent the votes as cast by the voters," [Doc. 2 at 10 (¶ 3)] or that the system "confers a politically discriminatory 5% advantage to a particular candidate," [Doc. 33 at 20–21]. Wood has never once addressed this. In any event, Wood failed to establish—and cannot establish—a likelihood of success on the merits of his claims.

Whether under his disparate treatment or vote dilution theories, Wood's equal protection claim fails. On disparate treatment, another court in the Northern District of Georgia reviewed the same claims about the signature verification OEB and found that "no voter—including Wood—was treated any differently than any other voter." *Wood I*, 2020 WL 6817513 at *9. Nor does Wood claim his right to vote was burdened by absentee

ballot procedures, because he does not allege he voted absentee (indeed, he did not vote in the 2021 runoff at all, Mot. to Supplement, Ex. A) and thus, no burden befell him. *See Id.* at *9. Accordingly, the rational basis standard applies, *id.* at *8 (quoting *Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012)), which is "highly deferential," requiring only "*any reasonably conceivable state of facts* that could provide a rational basis for the statute." *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001) (citation omitted) (emphasis in original). Here, the State has a strong interest in the orderly and efficient handling of its elections, *New Ga. Project*, 976 F.3d at 1282, sufficient to justify all of the challenged procedures.

With respect to vote dilution, Wood's claims simply do not fit within this framework, as the *Wood I* court recognized. 2020 WL 6817513 at *9 ("This theory has been squarely rejected.") (citing *Bognet*, 980 F.3d at 354). Accepting Wood's theory to the contrary would "transform every violation of state election law (and, actually, every violation of every law) into a potential federal equal-protection claim requiring scrutiny of the government's 'interest' in failing to do more to stop the illegal activity." *Bognet*, 980 F.3d at 355.

Wood is also unlikely to succeed on his claims under the Due Process and Guarantee Clauses. Wood's procedural due process claim fails for the same reason as his equal protection claim: Wood did not identify any burden on his fundamental right to vote. This failure renders impossible the required *Anderson-Burdick* analysis that weighs the character and magnitude of the burden on the right to vote against the interests the State contends justify the burden. *New Ga. Project v. Raffensperger*, 976 F.3d at 1280 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)). Wood's substantive due process claim is equally unlikely to succeed because such claims are narrowly limited to instances where patent fundamental unfairness is demonstrated. *Curry*, 802 F.2d at 1314. Wood's allegations here though are "garden variety" election disputes that do not rise to the level of constitutional deprivation. *Wood I*, 2020 WL 6817513 at *12 (citing *Curry*, 802 F.2d at 1314–15).

Finally, Wood's Guarantee Clause claims do not make it out of the starting gate. Wood cites no authority for a justiciable claim under the Guarantee Clause.

B. Wood cannot demonstrate irreparable injury.

As to the third element required for injunctive relief, irreparable injury, Wood's TRO motion merely makes the blanket

assertion that the harm "is apparent" because if the runoff is not halted (never mind that it already occurred), his right to vote will be infringed and the election's results will be improper. [Doc. 2 at 27–28 (¶ 43)]. Putting aside Wood's conclusory assertion of harm, Wood stated he intended to vote in person, [Doc. 1 at 1 (¶ 3)], and, accordingly, would not have been subject to most of the election procedures he alleges cause any harm. Regardless, Wood did not vote in the 2021 runoff, so he did not suffer *any* harm: he cast no vote which could have been diluted or disparately treated. Mot. to Supplement Ex. A. Nor can Wood assert harm from any "improper" election results because "[v]oters have no judicially enforceable interest in the outcome of an election." *Jacobson*, 974 F.3d at 1246.

C. The balance of the equities and public interest support the district court's denial of his motion.

The remaining factors weigh heavily against Wood and the request for injunctive relief as well. "Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Court orders that affect elections undermine that confidence and "result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5. Here, Wood sought injunctive

relief to halt the runoff and alter the procedures to which the public had become accustomed. Worse still, the motion was made just days before Election Day, and during the early voting period—not on the eve of the election, but in the middle of it. *New Ga. Project*, 976 F.3d at 1283.

CONCLUSION

The district court's order properly concluded that Wood lacks standing—he alleged no injury which confers standing under Article III and failed to show traceability and redressability. In any event, Wood suffered no injury even assuming his conspiracy theories are true because *he* chose not to vote, just as he encouraged thousands of Georgians to do. Further, the 2021 runoff has come and gone, precluding Wood's requested relief, and his state law claims (also now moot given the passage of SB 202), are not properly before the federal courts. But even if Wood could overcome these legal hurdles, the district court did not err in declining to enjoin the 2021 runoff.

For these reasons, this Court should affirm the district court's dismissal of Wood's claims.

Respectfully submitted, this 24th day of May, 2021.

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2021, I served this brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

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